



## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket No. FWS–R5–ES–2011–0024; 4500030113]**

**RIN 1018–AY98**

### **Endangered and Threatened Wildlife and Plants; Listing the Northern Long-eared Bat With a Rule Under Section 4(d) of the Act**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule and reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to create a species-specific rule under authority of section 4(d) of the Endangered Species Act of 1973, as amended (Act), that provides measures that are necessary and advisable to provide for the conservation of the northern long-eared bat (*Myotis septentrionalis*), should we determine this species warrants listing as a threatened species under the Act. In addition, we announce the reopening of the public comment period on the October 2, 2013, proposed rule to list the northern long-eared bat as an endangered species under the Act.

**DATES:** We will accept comments received or postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments by one of the following methods:

(1) Electronically: Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS–R5–ES–2011–0024, which is the docket number for this rulemaking. You may submit a comment by clicking on “Comment Now!”

(2) By hard copy: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R5–ES–2011–0024; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by one of the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Tony Sullins, Endangered Species Chief, Midwest Regional Office, 5600 American Blvd. West, Suite 990, Bloomington, MN 55437, by telephone 612–725–3548 or by facsimile 612–725–3548. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

## **SUPPLEMENTARY INFORMATION:**

### **Executive Summary**

On October 2, 2013, the Service proposed to list the northern long-eared bat as an endangered species (78 FR 61046). To date, we solicited public comment on this proposal on three separate occasions, totaling 180 days. Through these public comment periods, we received numerous comments and additional information suggesting we evaluate listing the northern long-eared bat as a threatened species with a species-specific rule under section 4(d) of the Act excepting specific forms of take. The Service has not yet made a final listing decision regarding the status of the northern long-eared bat (e.g., not warranted, threatened, or endangered); however, in our review of public comments we did determine that if threatened status is warranted, a species-specific rule under section 4(d) of the Act rule may be advisable. Therefore, this document consists of: (1) A proposed rule under section 4(d) of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 et seq.), that outlines the prohibitions, and exceptions to those prohibitions, necessary and advisable to provide for the conservation of the northern long-eared bat; and (2) a reopening of the comment period for the proposed rule to list the northern long-eared bat as an endangered species under the Act.

### **The need for the regulatory action and how the action will meet that need**

Based on information received during three open comment periods and a time extension, the Service is considering multiple public comments and additional information to determine if listing as a threatened species may be appropriate. If threatened status is appropriate, Section 4(d) of the Act specifies that, for threatened species, the Secretary shall issue such regulations as she deems necessary and advisable to provide for the conservation of the species. Further, a 4(d) rule may identify activities that would not be prohibited under section 9 of the Act.

Although the Service has not yet made a final listing determination for the northern long-eared bat, we are proposing this 4(d) rule in the event that our final listing determination is to list the species as a threatened species. If we list the species as an endangered species or find that it does not warrant listing, we will withdraw this proposed rule. If we list the species as a threatened species, we intend to publish a final 4(d) rule concurrent with, and as a component of, the final listing rule. Consistent with section 4(d) of the Act, this proposed 4(d) rule provides measures that are tailored to our current understanding of the conservation needs of the northern long-eared bat.

### **Statement of legal authority for the regulatory action**

Under section 4(d) of the Act, the Secretary of the Interior has discretion to issue such regulations as she deems necessary and advisable to provide for the conservation of the species. The Secretary also has the discretion to prohibit by regulation with respect to a threatened species, any act prohibited by section 9(a)(1) of the Act.

## **Summary of the Major Provisions of the Regulatory Action In Question**

The proposed species-specific 4(d) rule prohibits purposeful take of northern long-eared bats throughout its range except in instances of removal of northern long-eared bats from human dwellings and authorized capture and handling of northern long-eared bat by individuals permitted to conduct these same activities for other listed bats.

In areas not affected by white nose syndrome (WNS), a disease currently affecting many U.S. bat populations, all incidental take resulting from any otherwise lawful activity will be excepted from prohibition.

In areas affected by WNS, all incidental take prohibitions apply except that take attributable to forest management practices, maintenance and limited expansion of transportation and utility rights-of-way, removal of trees and brush to maintain prairie habitat, and limited tree removal projects shall be excepted from the take prohibition, provided these activities protect known maternity roosts and hibernacula. Further, removal of hazardous trees for the protection of human life or property shall be excepted from the take prohibition.

## **Public Comments**

To allow the public to comment simultaneously on this proposed species-specific 4(d) rule and the proposed listing rule, we also announce the reopening of the comment period on the Service's October 2, 2013, proposed rule to list the northern long-eared bat as an endangered species under the Act. If the result of our final listing determination concludes that threatened species status is appropriate for the northern long-eared bat, we intend to finalize the species-

specific 4(d) rule with the final listing rule. Therefore, we request comments or information from other concerned Federal and State agencies, the scientific community, or any other interested party concerning the proposed listing and the proposed 4(d) rule. We also are seeking peer review comments from knowledgeable individuals with scientific expertise to review our analysis of the best available science and application of that science and to provide any additional scientific information to improve this proposed rule. We will consider all comments and information received during our preparation of a final determination on the status of the species and the rule under section 4(d) of the Act, if threatened status is determined. Accordingly, if our final decision is to list the species as a threatened species, and we determine that it is necessary and advisable to promulgate a species specific 4(d) rule under the Act, any 4(d) rule we finalize may differ from this proposal based on specific public comments and any new information that may become available.

With regard to the proposed 4(d) rule, we particularly seek comments regarding:

- (1) Whether measures outlined in this proposed rule under section 4(d) of the Act are necessary and advisable for the conservation and management of the northern long-eared bat.
- (2) Whether it may be appropriate to except incidental take as a result of other categories of activities beyond those covered in this proposed rule and, if so, under what conditions and with what conservation measures.

(3) Whether the Service should modify the portion of this rule under section 4(d) of the Act that defines how the portion of the northern long-eared bat range will be identified as the “WNS buffer zone.” We are seeking comments regarding the factors and process we used to delineate where on the ground we believe WNS is likely affecting the northern long-eared bat and whether that delineation should incorporate political boundaries (e.g., county lines) for ease in describing the delineated area to the public.

(4) Additional provisions the Service may wish to consider for a rule under section 4(d) of the Act in order to conserve, recover, and manage the northern long-eared bat.

Please note that comments merely stating support for or opposition to the actions under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made “solely on the basis of the best scientific and commercial data available.”

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review.

However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Midwest Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

### **Previous Federal Actions**

For a complete list of previous Federal actions, see the proposed rule to list the northern long-eared bat (78 FR 61046). On October 2, 2013, we published in the **Federal Register** a proposed rule to list the northern long-eared bat as an endangered species under the Act. The proposed rule had a 60-day comment period, ending on December 2, 2013. On December 2, 2013, we extended this comment period through January 2, 2014 (78 FR 72058). On June 30, 2014, we announced a 6-month extension of the final determination on the proposed listing rule for northern long-eared bat, and we reopened the public comment period on the proposed rule for 60 days, until August 29, 2014 (79 FR 36698). On November 18, 2014, we again opened the comment period for an additional 30 days, which closed on December 18, 2014 (79 FR 68657). During the comment period we received one request for a public hearing, which was held in Sundance, Wyoming, on December 2, 2014.



## **Background**

On October 2, 2013, the Service proposed to list the northern long-eared bat as an endangered species. To date, we solicited public comment on this proposal on three separate occasions, totaling 180 days. Through these public comment periods, we received numerous comments and additional information suggesting we evaluate listing the northern long-eared bat as a threatened species with a species-specific rule under section 4(d) of the Act excepting specific forms of take. The Service has not yet made a final listing decision regarding the status of the northern long-eared bat (e.g., not warranted, threatened, or endangered); however, in our review of public comments we did determine that if threatened status is warranted, a species-specific rule under section 4(d) of the Act rule may be advisable. Therefore, this document consists of: (1) A proposed rule under section 4(d) of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 et seq.), that outlines the prohibitions, and exceptions to those prohibitions, necessary and advisable to provide for the conservation of the northern long-eared bat; and (2) a reopening of the comment period for the proposed rule to list the northern long-eared bat as an endangered species under the Act.

Unlike the Act's provisions regarding endangered species, the Act does not specify particular prohibitions, or exceptions to those prohibitions, for threatened species. Instead, under section 4(d) of the Act, the Secretary of the Interior has the discretion to issue such regulations as she deems necessary and advisable to provide for the conservation of such species, including discretion to prohibit by regulation, with respect to any threatened species, any act prohibited under section 9(a)(1) of the Act. By delegation from the Secretary, the Service has exercised this discretion to promulgate regulations that apply general take and other prohibitions (50 CFR 17.31) to threatened species, while allowing exceptions to those prohibitions as authorized by

permit (50 CFR 17.32). Alternately, the Service may issue a rule under section 4(d) of the Act that establishes specific prohibitions and exceptions that are tailored to the specific conservation needs of a particular species (see 50 CFR 17.31(c)). In such cases, some of the prohibitions and authorizations under 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into the rule, but the 4(d) rule will also include provisions that are tailored to the specific conservation needs of the threatened species and may be more or less restrictive than the general provisions at 50 CFR 17.31. The final species-specific 4(d) rule will contain all the applicable prohibitions and exceptions.

This document discusses only those topics directly relevant to the proposed 4(d) rule for the northern long-eared bat. For more information on the northern long-eared bat and its habitat, please refer to the October 2, 2013, proposed listing rule, (78 FR 61046), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R5–ES–2011–0024) or from the Midwest Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

### **Provisions of the Proposed 4(d) Rule for the Northern Long-eared Bat**

Under section 4(d) of the Act, the Secretary may publish a species-specific rule that modifies the standard protections for threatened species with prohibitions and exceptions tailored to the conservation of the species that are determined to be necessary and advisable. Under this proposed 4(d) special rule, the Service proposes that all of the prohibitions under 50 CFR 17.31 and 17.32 will apply to the northern long-eared bat and are necessary and advisable to provide for the conservation of the species, except as noted below. The proposed rule under section 4(d)

of the Act will not remove, or alter in any way, the consultation requirements under section 7 of the Act.

As discussed in the October 2, 2013, proposed rule (78 FR 61046), the primary factor supporting the proposed determination of endangered species status for the northern long-eared bat is the disease, white-nose syndrome (WNS). We further determined that other threat factors, including forest management activities, wind-energy development, habitat modification, destruction and disturbance, and other threats may have cumulative effects to the species in addition to WNS; however, they have not independently caused significant, population-level effects on the northern long-eared bat. Based upon information received during public comment periods, we are reanalyzing the species status to determine if listing as threatened is appropriate. Therefore, we are proposing this rule under section 4(d) of the Act and seeking public review and comment on it so in the event we determine that the northern long-eared bat meets the definition of a threatened species instead of an endangered species we can finalize this 4(d) rule, which provides exceptions to the prohibitions for some of these activities that cause cumulative effects, as we deem necessary and advisable for the conservation of the species concurrently with our final listing determination.

We conclude that certain activities described in this section of the preamble, when conducted in accordance with the conservation measures identified herein, will provide protection for the northern long-eared bat during its most sensitive life stages. These activities are: forest management activities, subject to certain time restrictions, maintenance and minimal expansion of existing rights-of-way and transmission corridors (also subject to certain restrictions), native prairie management, other projects resulting in minimal tree removal, hazard

tree removal, removal of bats from and disturbance within human structures, and capture, handling, attachment of radio transmitters, and tracking northern long-eared bats for a 1-year period following the effective date of the final rule. The Service proposes that incidental take that is caused by these activities implemented on private, State, tribal, and Federal lands will not be prohibited provided those activities abide by the conservation measures in the rule and are otherwise legal and conducted in accordance with applicable State, Federal, tribal, and local laws and regulations.

*Buffer zone around WNS and Pseudogymnoascus destructans (the fungus that causes WNS)  
positive counties (WNS buffer zone)*

Currently, not all of the range of northern long-eared bat is affected by WNS. In the proposed listing (78 FR 61046), the Service concluded that the proposed status determination of endangered species was primarily based on the impacts from WNS, and that the other threats, when acting on the species alone, were not causing the species to be in danger of extinction. Given this information, the Service proposes that while all purposeful take will be prohibited with the exception of removal of bats from human dwellings and survey and research efforts conducted within a 1-year period following the effective date of the final rule. All other take incidental to other lawful activities will be allowed in those areas of the northern long-eared bat range not in proximity to documented occurrence of WNS or *Pseudogymnoascus destructans*, as identified by the Service.

Currently, WNS is mainly detected by surveillance at bat hibernacula. Thus, our direct detection of the disease is limited largely to wintering bat populations in the locations where they

hibernate. However, bats are known to leave hibernacula and travel great distances, sometimes hundreds of miles, to summer roosts. Therefore, the impacts of the disease are not limited to the immediate vicinity around bat hibernacula, but have an impact on a landscape scale. For northern long-eared bats, as with all species, this means that the area of influence of WNS is much greater than the counties known to harbor affected hibernacula, resulting in impacts to a much larger section of the species' range. To fully represent the extent of WNS, we must also include these summer areas.

Overall, northern long-eared bats are not considered to be long-distance migrants, typically dispersing 40–50 miles (64–80 kilometers) from their hibernacula. However, other bat species that disperse much further distances are also vectors for WNS spread and may transmit the disease to northern long-eared bat populations. It has been suggested that the little brown bat (*Myotis lucifugus*), in particular, be considered a likely source of WNS spread across eastern North America. Little brown bats tend to migrate greater distances, particularly in the western portions of their range, with distances up to 350 miles (563 km) or more recorded (See Ellison 2008, p. 21; Norquay et al. 2013, p. 510). In a recent study, reporting on bat band recoveries of little brown bats over a 21-year period, Norquay et al. (2013, pp. 509–510) describe recaptures between hibernacula and summer roosts with a maximum distance of 344 miles (554 km) and a median distance of 288 miles (463 km).

For the purpose of this rule, the portion of the northern long-eared bat range that is considered to be affected by WNS is that area within 150 miles (241 km) of the boundary of U.S. counties or Canadian districts where the fungus *Pseudogymnoascus destructans* or WNS has been detected. We acknowledge that 150 miles (241 km) does not capture the full range of

potential WNS infection, but represents a compromise distance between the known migration distances of northern long-eared bats and little brown bats that is suitable for our purpose of estimating the extent of WNS infection on the northern long-eared bat. Anywhere outside of the geographic area defined by these parameters, northern long-eared bat populations will not be considered to be experiencing the impacts of WNS.

The Service proposes to define the term “WNS buffer zone” as the portion of the range of the northern long-eared bat within 150 miles of the boundaries of U.S. counties or Canadian districts where the fungus *Pseudogymnoascus destructans* or WNS has been detected.

For purposes of this proposed 4(d) rule, coordination with the local Service Ecological Services field office is recommended to determine whether specific locations fall within the WNS buffer zone. For more information about the current known extent of WNS and 150-mile (241-km) buffer, please see <http://www.fws.gov/midwest/endangered/mammals/nlba/>.

#### *Conservation measures*

The Service proposes that take incidental to certain activities conducted in accordance with the following habitat conservation measures, as applicable, will not be prohibited (i.e., excepted from the prohibitions):

- (i) Occur more than 0.25 mile (0.4 km) from a known, occupied hibernacula;
- (ii) Avoid cutting or destroying known, occupied maternity roost trees during the pup season (June 1–July 31); and

(iii) Avoid clearcuts within 0.25 (0.4 km) mile of known, occupied maternity roost trees during the pup season (June 1–July 31).

Note that activities that may cause take of northern long-eared bat that do not use these conservation measures may still be done, but only after consultation with the Service. This means that, while the resulting take from such activities is not excepted by this rule, the take may be authorized through other means provided in the Act (i.e., section 7 consultation or an incidental take permit).

For purposes of this proposed rule and the conservation measures listed above, coordination with the local Service Ecological Services field office is recommended to determine the specific locations of the “known hibernacula” and “known maternity roosts.” These locations will be informed by records in each State’s Natural Heritage database, Service records, other databases, or other survey efforts. Hibernacula are generally defined as locations where one or more northern long-eared bats have been detected during hibernation or outside during staging or swarming. Similarly, maternity roosts are generally defined through roost records in each State’s Natural Heritage database, Service records, other databases, or other survey efforts for northern long-eared bat or other bat species.

These conservation measures aim to protect the northern long-eared bat during its most sensitive life stages. Hibernacula are an essential habitat and should not be destroyed or modified (any time of year). In addition, there are periods of the year when northern long-eared bats are concentrated at and around their hibernacula (fall, winter, and spring). Northern long-eared bats are susceptible to disruptions near hibernacula in the fall, when they congregate to

breed and increase fat stores, which are depleted from migration, before entering hibernation. During hibernation, northern long-eared bat winter colonies are susceptible to direct disturbance. Briefly in spring, northern long-eared bats yet again use the habitat surrounding hibernacula to increase fat stores for migration to their summering grounds. This feeding behavior is particularly important for the females, who must obtain enough fat stores to carry not only themselves, but also their unborn pups, to their summer home range. In the summer maternity season, northern long-eared bat maternity colonies are especially vulnerable during the time after the pups are born, but before pups are able to fly (the non-volant period or pup season). During this time, pups are unable to flee danger without the assistance of their mothers, thus increasing the potential for activities affecting maternity roosts to kill and injure individual bats. Once the pups can fly, this risk is reduced because the pups will have the ability to flee their roost if it is being cut or otherwise damaged, potentially avoiding harm, injury, or mortality.

The Service concludes that a 0.25-mile (0.4-km) buffer should be sufficient to protect most known, occupied hibernacula and hibernating colonies. This buffer will provide basic protection for the hibernacula and hibernating bats in winter from direct impacts, such as filling, excavation, blasting, noise, and smoke exposure. This buffer will also protect some roosting and foraging habitat around the hibernacula. Northern long-eared bats have been found up to 8.2 miles (13.2 km) from their hibernacula during the fall, although the majority of roosts were within 1.6 miles (2.6 km) (Lowe 2012, p. 32), using habitat within that area for roosting, foraging, and swarming. However, given that northern long-eared bats are not locally abundant and compose a small proportion of the total number of bats in any given hibernaculum (Barbour and Davis 1969, p. 77; Mills 1971, p. 625; Caire *et al.* 1979, p. 405; Caceres and Barclay 2000, pp. 2–3) and the species is rarely recorded in concentrations of more than 100 in a single



hibernaculum (Barbour and Davis, 1969, p. 77), we do not expect that all of the habitat around a hibernaculum would be necessary for these purposes. Therefore, our best judgment is that protection of the habitat within 0.25 mile (0.4 km) of hibernacula should provide sufficient habitat to meet the needs of most hibernating populations.

The Service concludes that, in addition to preservation of actual known maternity roosts, a 0.25-mile (0.4-km) buffer for all clearcutting activities will be sufficient to protect the habitat surrounding known maternity roosts during the pup season. This buffer will prevent the cutting of known occupied maternity roost trees during the pup season from clearcutting activities and protect some habitat for known maternity colonies. Northern long-eared bats in the summer have an approximate average maximum foraging distance of 1.5 miles (2.4 km) from a roost tree (Sasse and Perkins, 1996, p. 95; Badin, 2014, p. 76), and average home range size has been documented between 44–460 acres (Lacki et al. 2009, p. 1169; Owen et al. 2003, p. 353; Carter and Feldhamer 2005, p. 264). Based on this information, our best judgment is that the amount of land within 0.25 mile (0.4 km) of a maternity roost, or 128 acres, will provide sufficient roosting, foraging, and commuting habitat to sustain most colonies for the duration of the pup season.

### *Forest Management*

The Service proposes that incidental take that is caused by forest management, when carried out in accordance with the conservation measures, will not be prohibited. Forest management includes the suite of activities used to maintain and manage forest ecosystems, including, but not limited to, timber harvest and other silvicultural treatments, prescribed burning, invasive species control, wildlife openings, and temporary roads. Such activities should

also adhere to any applicable State water quality best management practices, where they exist. Although forest ecosystems may include non-forested land cover types, such as wetlands and upland openings, this category of activities generally maintains forested landcover. We do not consider conversion of a mixed forest into an intensively managed monoculture pine plantation as forest management covered under this proposed rule, as typically these types of monoculture pine plantations provide very poor-quality bat habitat.

Where northern long-eared bats are present when these forest management activities are performed, bats could be exposed to habitat alteration or loss or direct disturbance (i.e., heavy machinery) or removal of maternity roost trees (i.e., harvest). In general, however, the northern long-eared bat is considered to have more flexible habitat requirements than other bat species (Carter and Feldhamer 2005, pp. 265–266; Timpone et al. 2010, pp. 120–121), and most types of forest management should provide suitable habitat for the species over the long term (with the exception of conversion to monoculture pine forest, as discussed above). Based upon information obtained during previous comment periods on the proposed rule to list the bat as an endangered species, approximately 2 percent of forests in States within the range of the northern long-eared bat are impacted by forest management activities annually (Boggess et al, 2014, p. 9). Of this amount, in any given year a smaller fraction of forested habitat is impacted during the active season when pups and female bats are most vulnerable. These impacts are addressed by the above conservation measures proposed for inclusion in this rule.

Therefore, we anticipate that habitat modifications resulting from activities that manage forests would not significantly affect the conservation of the northern long-eared bat. Further, although activities performed during the species' active season (roughly April through October)

may directly kill or injure individuals, implementation of the conservation measures provided for in the proposed rule will limit overall take by protecting currently known populations during their more vulnerable life stages.

*Maintenance and limited expansion of existing rights-of-way and transmission corridors*

The Service proposes that incidental take that is caused by activities for the purpose of maintenance and limited expansion of existing rights-of-way and transmission corridors, when carried out in accordance with the conservation measures, will not be prohibited (i.e., will be excepted from the prohibitions). Rights-of-way (ROW) and transmission corridors are in place for activities such as transportation (i.e., highways, railways), utility transmission lines, and energy delivery (pipelines), though they are not limited to just these types of corridors. The Service proposes that take of the northern long-eared bat will not be prohibited provided the take is incidental to activities within the following categories:

- (1) Routine maintenance within an existing corridor or ROW, carried out in accordance with the previous described conservation measures.
- (2) Expansion of a corridor or ROW by up to 100 feet (30 m) from the edge of an existing cleared corridor or ROW, carried out in accordance with the previously described conservation measures.

General routine maintenance is designed to limit vegetation growth, within an existing footprint, so that operations can continue smoothly. These activities may include tree trimming or removal, mowing, and herbicide spraying. However, depending on the purpose of the corridor

or ROW, maintenance may only be performed infrequently and trees and shrubs may encroach into, or be allowed to grow within, the ROW until such a time as maintenance is required. Expansion of these areas requires removal of vegetation along the existing ROW to increase capacity (e.g., road widening).

Northern long-eared bats can occupy various species and sizes of trees when roosting. Because of their wide variety of habitat use when roosting and foraging, it is possible that they may be using trees within or near existing ROWs. Therefore, vegetation removal within or adjacent to an existing ROW may remove maternity roost trees and foraging habitat. Individuals may also temporarily abandon the areas, avoiding the physical disturbance until the work is complete. While ROW corridors can be large in overall distance, due to the small scale of the habitat alteration involved in maintenance of the existing footprint, potential take is limited. No new forest fragmentation is expected as this expands existing open corridors. We also expect that excepting take prohibitions from ROW maintenance and limited expansion will encourage co-location of new linear projects within existing corridors. We conclude that the overall impact of ROW maintenance and limited expansion activities is not expected to adversely affect conservation and recovery efforts for the species.

### *Prairie management*

The Service proposes that incidental take that is caused by activities for the purpose of prairie management, when carried out in accordance with the conservation measures, will not be prohibited (i.e., will be excepted from the prohibitions). In some areas of the northern long-eared bat range, tree and shrub species are overtaking prairie areas. Landowners and agencies

working to establish or conserve prairies have to remove trees and brush in order to maintain grasslands. Maintenance activities include cutting, mowing, burning, or herbicide use on woody vegetation to minimize encroachment into prairies (Grassland Heritage Foundation Website, accessed December 23, 2014). If these prairies are not managed, they can eventually become shrub or forest lands sometimes in as few as 40 years (Briggs et al. 2002 and Ratajczak et. al 2001). We conclude that the overall impact of prairie management is not expected to adversely affect conservation and recovery efforts for the species.

#### *Projects resulting in minimal tree removal*

The Service proposes that incidental take that results from projects causing minimal tree removal, when carried out in accordance with the conservation measures, will not be prohibited (i.e., will be excepted from the prohibitions). Throughout the millions of acres of forest habitat in the northern long-eared bat range, many activities involve cutting or removal of individual or limited numbers of trees, but do not significantly change the overall nature and function of the local forested habitat. Some of these activities include firewood cutting, shelterbelt renovation, removal of diseased trees, tree removal for other small projects (i.e., culvert replacement), habitat restoration for fish and wildlife conservation, and backyard landscaping. These ongoing activities can occur throughout the northern long-eared bat range, but we do not believe they materially affect the local forest habitat for this species and in some cases increase habitat availability in the long term. We conclude that the overall impact of projects causing minimal tree removal is not expected to adversely affect conservation and recovery efforts for the species.

#### *Hazardous tree removal*

The Service proposes that incidental take that is caused by removal and management of hazardous trees will not be prohibited (i.e., will be excepted from the prohibitions). Removal of hazardous trees is typically done as deemed necessary for human safety or for the protection of human facilities. Hazardous trees typically have defects in their roots, trunk, or branches that make them likely to fall, with the likelihood of causing personal injury or property damage. The limited removal of these hazardous trees may be widely dispersed but limited, and should result in very minimal incidental take of northern long-eared bat. Therefore, the Service proposes that take incidental to the removal of hazardous trees will not be prohibited. We recommend that, wherever possible, removal of hazardous trees be done during the winter, when these trees will not be occupied by bats. We conclude that the overall impact of removing hazardous trees is not expected to adversely affect conservation and recovery efforts for the species.

#### *Removal of bats from and disturbance within human dwellings*

The Service proposes that take that is caused by removal of bats from and disturbance within human dwellings will not be prohibited (i.e., will be excepted from the prohibitions), provided those actions comply with all applicable State laws. Northern long-eared bats have further been documented roosting in human-made structures, such as buildings, barns, a park pavilion, sheds, cabins, under eaves of buildings, behind window shutters, and in bat houses (Mumford and Cope 1964, p. 72; Barbour and Davis 1969, p. 77; Cope and Humphrey 1972, p. 9; Amelon and Burhans 2006, p. 72; Whitaker and Mumford 2009, p. 209; Timpone et al. 2010, p. 119; Joe Kath 2013, pers. comm.). We conclude that the overall impact of bat removal from

human dwellings is not expected to adversely affect conservation and recovery efforts for the species. In addition, we provide the following recommendations:

- (A) Minimize use of pesticides (e.g., rodenticides) and avoid use of sticky traps in and around structures with roosting bats.
- (B) If bats (of any species) are using structures (e.g., barns or other outbuildings) as roosts, and these structures are proposed for removal, removal should be performed outside of the summer maternity season, unless there are human health or safety concerns associated with the structure. Contact a nuisance wildlife specialist for humane exclusion techniques.

*Capture, handling, attachment of radio transmitters, and tracking northern long-eared bats for 1 year*

For a limited period of 1 year from the effective date of this rule, the Service proposes that purposeful take that is caused by the authorized capture, handling, attachment of radio transmitters, and tracking of northern long-eared bats by individuals permitted to conduct these same activities for other listed bats will be excepted from the prohibitions. One method of determining presence/probable absence of northern long-eared bats is to conduct mist-netting at summer sites or harp trapping at hibernacula. Gathering of this information is essential to monitor the distribution and status of northern long-eared bats over time. In addition, northern long-eared bats are often captured incidentally to survey and study efforts targeted at other bat species (e.g., Indiana bats). It is necessary and advisable for the conservation of northern long-eared bats to provide an exception for the purposeful take associated with these normal survey

activities conducted by qualified individuals to promote and encourage the gathering of information following standard procedures (including decontamination) as these data will help us conserve and recover this species. To receive an exception, proponents must have an existing research permit under section 10(a)(1)(A) of the Act (or similar State collector's permit applications in the northeast region of the Service) for other listed bat species. The rationale for this limited time period is that a final listing decision is expected at the start of the bat field season, and it will be difficult to amend all permits in time for this year.

The Service concludes, for the reasons specified above, that all of the conservation measures, prohibitions, and exceptions identified herein individually and cumulatively are necessary and advisable for the conservation of the northern long-eared bat and will promote the conservation of the species across its range.

Table 1 (below) summarizes the details of the species-specific proposed 4(d) rule for the northern long-eared bat.

Is the Area Affected by WNS (WNS buffer zone)?	Take prohibitions at 50 CFR 17.31 and 17.32	Take exceptions	
		Purposeful	Incidental
No	All apply, with the following exceptions listed here	Actions with the intent to remove northern long-eared bats from within human dwellings and that comply with all applicable State regulations.	Any incidental take of northern long-eared bats resulting from otherwise lawful activities.



		Actions relating to capture, handling, attachment of radio transmitters, and tracking of northern long-eared bats by individuals permitted to conduct these same activities for other bats, for a period of 1 year following the effective date of the final rule.	
Yes	All apply, with the following exceptions listed here	Actions with the intent to remove northern long-eared bats from within human dwellings and that comply with all applicable State regulations.	Implementation of forest management, maintenance and expansion of existing rights-of-way and transmission corridors, native prairie management, and minimal tree removal projects that: <ul style="list-style-type: none"> <li>• occur more than 0.25 mile (0.4 km) from a known, occupied hibernacula;</li> <li>• avoid cutting or destroying known, occupied maternity roost trees during the pup season (June 1 –July 31); and</li> <li>• avoid clearcuts within 0.25 (0.4 km) miles of known, occupied maternity roost trees during the pup season (June 1 –July 31).</li> </ul>
		Actions relating to capture, handling, attachment of radio transmitters, and tracking of northern long-eared bat by individuals permitted to conduct these same activities for other bats, for a period of 1 year following the effective date of the final rule.	Removal of hazard trees for the protection of human life and property.

## Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent

specialists regarding this proposed rule. The purpose of such review is to ensure that our determination of status for this species is based on scientifically sound data, assumptions, and analyses. We will send peer reviewers copies of this proposed rule concurrent with publication in the **Federal Register**. We will invite these peer reviewers to comment, during the reopening of the public comment period, on our use and interpretation of the science used in developing our proposed rule to list the northern long-eared bat and this proposed rule under section 4(d) of the Act.

We will consider all comments and information we receive during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

## **Required Determinations**

### **Clarity of the Rule**

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must: (a) be logically organized; (b) use the active voice to address readers directly; (c) use clear language rather than jargon; (d) be divided into short sections and sentences; and (e) use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the proposed rule, your comments

should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

#### **Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.)**

This rule does not contain any collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

#### **National Environmental Policy Act (42 U.S.C. 4321 et seq.)**

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). We intend to incorporate this proposed rule under section 4(d) of the Act into our final determination concerning the listing of the species or withdrawal of the proposal if new information is provided that supports that decision.

## **Government-to-Government Relationship with Tribes**

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

By letter dated July 29, 2014, we contacted known federally recognized tribal governments throughout the historical range of the northern long-eared bat. We sought their input on our development of a proposed rule to list the northern long-eared bat and encouraged them to contact the Midwest Regional Office or Regional Native American contacts if any portion of our request was unclear or to request additional information. We did not receive any comments regarding this request.

## **References Cited**

A complete list of all references cited in this proposed rule is available on the Internet at <http://www.regulations.gov> at Docket No. FWS-R5-ES-2011-0024 or upon request from the

Endangered Species Chief, Midwest Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

## **Authors**

The primary authors of this proposed rule are the staff members of the Midwest Regional Office (see **FOR FURTHER INFORMATION CONTACT**).

## **List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, and Transportation.

## **Proposed Regulation Promulgation**

Accordingly, we propose to further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 78 FR 61046 (October 2, 2013) as follows:

## **PART 17—[AMENDED]**

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

2. Amend § 17.11(h) by adding an entry for “Bat, northern long-eared” to the List of Endangered and Threatened Wildlife in alphabetical order under Mammals to read as set forth below:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*

(h) \* \* \*

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Mammals * * * * *							
Bat, northern long-eared	( <i>Myotis septentrio nalis</i> )	U.S.A. (AL, AR, CT, DE, DC, GA, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NH, NJ, NY, NC, ND, OH, OK, PA, RI, SC, SD, TN, VT, VA, WV, WI, WY); Canada (AB, BC, LB, MB, NB, NF, NS, NT, ON, PE, OC, SK, YT)	Entire	T		NA	17.40(n)

\* \* \* \* \*

3. Amend § 17.40 by adding paragraph (n) to read as follows:

**§ 17.40 Special rules—mammals.**

\* \* \* \* \*

(n) Northern long-eared bat (*Myotis septentrionalis*). The provisions of this rule are based upon the occurrence of white-nose syndrome (WNS), a disease affecting many U.S. bat populations. The term “WNS buffer zone” identifies the portion of the range of the northern long-eared bat within 150 miles of the boundaries of U.S. counties or Canadian districts where the fungus *Pseudogymnoascus destructans* or WNS has been detected. For current information regarding the WNS buffer zone, contact your local Service field office. Field office contact information may be obtained from the Service regional offices, the addresses of which are listed in 50 CFR 2.2.

(1) Outside the WNS buffer zone, the following provisions apply to the northern long-eared bat:

(i) *Prohibitions.* Except as noted in paragraphs (n)(1)(ii)(A) and (B) of this section, all the prohibitions and provisions of §§ 17.31 and 17.32 apply to the northern long-eared bat.

(ii) *Exceptions from prohibitions.*

(A) Purposeful take:

(1) Take resulting from actions taken to remove northern long-eared bats from within human dwellings, if the actions comply with all applicable State regulations.

(2) Take resulting from actions relating to capture, handling, attachment of radio transmitters, and tracking of northern long-eared bats by individuals permitted to conduct these



same activities for other species of bat listed in § 17.11(h) until [INSERT DATE 1 YEAR AFTER EFFECTIVE DATE OF FINAL RULE].

(B) Any incidental (non-purposeful) take of northern long-eared bats resulting from otherwise lawful activities.

(2) Inside the WNS buffer zone, the following provisions apply to the northern long-eared bat:

(i) *Prohibitions*. Except as noted in paragraphs (n)(2)(ii)(A) and (B) of this section, all prohibitions and provisions of §§ 17.31 and 17.32 apply to the northern long-eared bat.

(ii) *Exceptions from prohibitions*. Take of northern long-eared bat is not prohibited in the following circumstances:

(A) Purposeful take:

(1) Take resulting from actions taken to remove northern long-eared bats from within human dwellings, if the actions comply with all applicable State regulations.

(2) Take resulting from actions relating to capture, handling, attachment of radio transmitters, and tracking of northern long-eared bats by individuals permitted to conduct these same activities for other species of bat listed in § 17.11(h) until [INSERT DATE 1 YEAR AFTER EFFECTIVE DATE OF FINAL RULE].

(B) Incidental take:

(1) Implementation of forest management, maintenance and expansion of existing rights-of-way and transmission corridors, native prairie management, and minimal tree removal projects that:

(i) Occur more than 0.25 mile (0.4 km) from a known, occupied hibernacula;

(ii) Avoid cutting or destroying known, occupied maternity roost trees during the pup season (June 1–July 31); and

(iii) Avoid clearcuts within 0.25 (0.4 km) mile of known, occupied maternity roost trees during the pup season (June 1–July 31).

(2) Removal of hazardous trees for the protection of human life and property.

\* \* \* \* \*

Dated: January 12, 2015

Signed: Daniel M. Ashe

Director, U.S. Fish and Wildlife Service.

Billing Code 4310-55

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